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IN THE

United States Supreme Court.

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JOSEPH S. KAUFMAN, Plaintiff in Error,

vs.

W. T. TREDWAY, Trustee in the Estate of GUSTAVE KAUFMAN, Bankrupt.

In Error to the Superior Court of the State of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

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No. 187 OCTOBER TERM, 1903.

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W. T. TREDWAY, Trustee in the Estate of GUSTAVE KAUFMAN, Bankrupt.

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Argument.

We believe that this case ought to be dismissed because there is no question stated or involved which, under the rules governing this court, you are required or authorized to answer. In the case of *Jewell vs. Knight*, 123 United States Reports, page 426, the syllabus says, "Questions certified to this Court upon a division of opinion of two judges in the Circuit Court must be distinct points of law, clearly stated so that they can be definitely answered without regard to other issues of law or of fact; and not questions of fact or of mixed law and facts involving inferences of fact from particular facts stated in the certificate; nor as the whole case, even if divided into several points."

The opinion in the above case discloses that the facts are not unlike the facts in the case at bar, and a quotation will be helpful. "In the present case general creditors of Knight seek to set aside as fraudulent against them a warrant of attorney to confess judgment executed by Knight to

secure the payment of money lent to him in good faith by his wife and his bankers, and a subsequent sale of his stock of goods to satisfy those debts.

"The statements (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call the facts found, is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditor's knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn, but it is a statement of particular facts in the nature of matters of evidence upon which no decision can be made without inferring a fact which is not found."

"The main issue on the case upon which this decision must turn, and which the certificate attempts in various forms to refer to the determination of this court is, whether the sale of goods was fraudulent as against the plaintiffs. That is not a question of law, but a question either of fact or of mixed law and fact. Upon this record, therefore, this court cannot decide either that the decree of the Circuit Court should be affirmed or that it should be reversed or modified, but must order the appeal to be dismissed."

An in the case of *Brown vs. Atwell*, 92 United States, page 327, the Court said, "To give this Court jurisdiction over the judgment of a State Court it must appear that the decision of the federal question presented to that Court was necessary to the determination of the cause, and that it was actually decided or that without deciding it the judgment as rendered could not have been given.

And in the case of *Walter A. Wood Mowing & Reaping Machine Company vs. Skinner*, 139 United States, page 293, the Court said, "It is well settled by a long series of adjudications that to give this court jurisdiction by writ of error to the State Court, it must appear affirmatively not only that a federal question was presented for decision to the

highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

We submit that there was no federal question decided in this case. It is true that the basis of this action was the federal statute commonly known as the Bankrupt law, but there never was a moment during the entire controversy when there was any question as to the construction of that statute. At the initial stage of this case, the counsel for the plaintiff below and defendent in error here, as shown upon page 12, made this proposition : "If your Honor please, as I understand it, we must do two things here. We must show that Gustave Kaufman was a bankrupt. Then we must show further that J. S. Kaufman had knowledge of the fact that he was a bankrupt, or had reason to believe that fact. Now, what I am seeking to do at this point is simply to lay the foundation for the second. I want to show, as a matter of fact, that Gustave Kaufman was a bankrupt, and that it is demonstrated by the results in his estate ; and then, of course, if I were to stop there, I would not have succeeded at all, but I will have to go on and connect J. S. Kaufman with that," to which counsel for the defendant below and plaintiff in error in this Court, made response, "If you make an offer within the act, that if a bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before the adjudication and that the person receiving it or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, etc., if you propose now to follow this evidence to show that on August 4th we were in the category mentioned in this act, then I shall not make objection." The response of counsel for the plaintiff was, "I have no objection to making such an offer, to follow this testimony with such

testimony." By the Court, "Then there is no objection. Proceed."

A little later in the case in response to an objection by counsel for the defendant below, the Court said, "The Counsel for plaintiff has in his opening, and also in the case time after time, repeated the statement that he does not claim that he has made out any case until he shows that. We cannot require him to repeat it every time that he puts a question to the witness. If he does not show it, we will turn his case out of court. But we cannot have the interminable delay of having a repetition of that in connection with every question. We cannot require him to propose that in every question that he puts, when it is freely admitted all around that that is essential to his case." (See page 14 of Transcript of Record.) There never was a moment of time during the trial of this case when it was not agreed upon both sides of counsel table that in order to succeed, the plaintiff must satisfy the jury by the weight if the evidence that he must show, 1st, The bankrupt condition of Gustave Kaufman, and 2nd, That Joseph S. Kaufman knew or had reasonable cause to believe, when the payments were made to him that it was thereby intended to give him a preference. In the argument of this case by the plaintiff in error, their first proposition is(See page 6 of plaintiff's brief) "The payment of $1,086.64 made August 4th, 1898, by the debtor to the plaintiff in error was not a voidable preference within the meaning of the 60th section of the Bankrupt Act of 1898, and the trial judge should have taken the case from the jury." In the discussion of this throughout four or five pages it is simply a restatement of the evidence which was addressed at one time to the Common Pleas judge and afterwards to the State Supreme Court to the effect that there was not sufficient evidence of the facts to warrant submitting the case to a jury. As we understand the jurisdiction of this court, it is exactly that condition of affairs into which this court will not inquire. The case turned not upon the question of the law,

but the question of the fact, and three courts have said that it was properly submitted to the jury, and under the decisions above referred to, we believe that this court will not inquire into the merits of that submission.

The second question is like to it, namely, (See page 32, plaintiff's brief): "That if this Court should find that the payment of $1,086.64 was a voidable preference then the plaintiff in error is entitled to a set-off amounting to $767." This contention arose under another clause in the Bankrupt Act, which is as follows: (C) "If a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be unrecoverable for him". There never was any question but that if Joseph S. Kaufman had brought himself by testimony within the lines of this provision he would have been entitled to a credit, but his Honor, Judge McClung, who was the trial Judge in the Common Pleas Court, in his opinion filed in refusing a new trial, disposes of the whole question (See page 45, Transcript of Record): "It is perfectly plain that the party who claims the benefit of a set-off must assume the burthen of showing that he gave further credit for property which became a part of the debtor's estate."

"This $767.00 did not literally become a part of the bankrupt's estate."

"Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee."

"The most that defendant can ask (and this we would probably hold) is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off."

Under the Bankrupt Act, "Wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceeding not to exceed $300.00 to each claimant" are in the 4th clause of preferred claims."

"Assume that this money was used to pay labor claims."

There is nothing whatever to show that the amounts paid were earned within three months, nor how much was paid to each claimant nor does it even appear that there is enough in the estate to pay the claims preferred to this 4th class."

"As to this branch of the case defendant stands in the position of a plaintiff seeking to recover, and has not made out a case which entitles him to go to the jury."

Justice Beaver, of the Superior Court, when the case was affirmed, says (see page 48 transcript of Record): "In order to entitle the defendant to successfully set-off the payment of $767.00 against the money received by him, it was necessary for him to show that the amount which he sought to set off had become a part of the debtor's estate. Does this testimony show it? We cannot see that it does. The money was advanced for the express purpose of making certain specific payments. Whether it was applied or not does not appear. If the money had been applied to preferred claims under the act and the amount for distribution by the trustee had been thereby increased, the estate of the bankrupt would have been to that extent indirectly benefitted, but this does not appear, as it seems to us, that the payment became "a part of the debtor's estates", in order to entitle him to use it as a set-off. This was not shown and we cannot, therefore, convict the court of error in refusing to say to the jury that the set-off was established."

In the opinion of *Beaupre vs. Noyes*, 138 United States, page 397, the Court said: "Although a case from the highest court of a State may involve a federal question, yet if that court proceeds upon another and distinct ground not involv-

ing a federal question and sufficient in itself to maintain the final judgment without reference to the federal question involved, this judgment will be affirmed here."

Upon the question now before us both the trial court and the Superior Court proceeded upon the theory that if the defendant below could show that this $767 became a part of the estate either by having gone to the trustee or by having paid such preferred claims as would increase the estate in the hands of the trustee, then they would be entitled to a set-off, but in either case the defendant's testimony falls far short of the proof required, and so the determination turned not upon the construction of the act, but upon the testimony submitted in support of the contention of the defendant under the act. We cannot see how the third proposition as set out on thirty-sixth page of the plaintiff's brief, namely, "No interest is allowable on any amount recovered in this action," raised any question over this court as to jurisdiction. Surely the question of allowance or disallowance of interest upon an amount recovered is not a federal question to be submitted and argued. We think this case should be dismissed for the reason that the assignments of error did comply with the requirements of this Court.

In the case of *Wilson vs. Barnum*, 8th Howard, page 258 this Court decided in substance that the point placed before your Honors for your decision must be a point of law only, not involving any question of fact or any question of discretion.

In the case of the *United States vs. Bailey*, 9th Peters, page 267, this Court decided that the certificate must cover single points of law, and not the whole case; precise single points must be certified. This, of course, does not mean one point, but single points that are capable of being decided without connection with any of the others.

And in the case of the *United States vs. Rosenberg*, 7th Wallace, page 580, the Court decided that the matter must not be such as appeal to the discretion Supreme Court. In the as-

signments before us, the first and second really contain all that is in the balance of the assignments, and each of the assignments is dependent for something upon some other one of the assignments, making it impossible to decide one without reference to the other, or to decide any one of them without the ascertainment of facts not contained in the point itself. That we may not seem to treat the argument upon the plaintiff's side of this case with any disrespect, we beg to submit this brief statement of the questions involved, how they arose and why the determination of them was right. The burden was originally upon the plaintiff to establish the insolvency of the debtor, and such knowledge either actual or inferred of the preferred creditor as made him liable to refund to the trustee. This cannot be stated too strongly. Collier on Bankruptcy, page 308, says very clearly that "however much there may have been a preference, that unless the creditor had knowledge of the bankrupt condition of the debtor or had reasonable cause to believe that the transfer was made with intent to give a preference, that it is not voidable." We sought to show these facts. The bankrupt condition of Gustave Kaufman is not controverted, and therefore needs no consideration. The only question is, "Was the evidence adduced by the plaintiff sufficient to carry the question to the jury as to whether J. S. Kaufman knew of this bankrupt condition at the time that he received the payments." They were brothers; J. S. Kaufman had indorsed for his brother, to assist him in raising money. He had participated in interviews upon the question of Gustave Kaufman's credit. He had procured further credit for his brother by an assurance that he would take charge of the financial end of Gustave Kaufman's affairs. He had taken an assignment of all the property which Gustave Kaufman had, even going so far as to include in that assignment all his interest in household goods which were claimed by the wife of Gustave Kaufman. We argued that these facts were sufficient, if believed, to warrant the jury in finding

that he had knowledge of his brother's condition, and that he ought not to have taken the $1,086.64 paid to him on the fourth of August, sixteen days prior to the filing of the petition in bankruptcy. Of course, Mr. Kaufman denied his knowledge of the insolvency of his brother, but that certainly did nothing more than raise an issue of fact to be submitted to the jury. It was submitted to a jury, who found against the defendant's contention. It is of no avail to argue that our testimony did not come up fully to the offers. We think they did, but whether they did or not, is not a federal question to be considered by this Court, and it was considered a determination by the Courts of the State of Pennsylvania.

In the discussion of the second question as to the right of setting off in the Court below, we took two positions. 1st. That J. S. Kaufman was not in the position to claim the benefit of this provision in the act. The provision recites, "If a creditor has been preferred and afterwards in good faith gives the debtor without security any kind of property which becomes part of the debtor's estate, etc., etc." We took then and restate now this position. This provision is made for the benefit of one who is in the class of preferred creditors, and who, discovering that fact, does the best that he can to remove himself from that class. Mr. Kaufman is contending here, and has throughout this case, that he is not a preferred creditor. If he is not a preferred creditor in his own estimate, he could not have returned in good faith any property to the estate of the debtor. It does not help him that the jury found he was a preferred creditor, for this merciful provision of the Act of Congress was for the purpose of protecting not a man whom a jury would say was a preferred creditor, but one who himself agrees he is a preferred creditor. The second position, and the one upon which the courts below relied in deciding this case, was that there is no evidence here that there was a payment which inured to the benefit of the estate of the bankrupt. This provision certainly does not mean simply that the creditor should

have given money or anything else to the bankrupt, for it specifically says that it must have been given to the bankrupt's estate and become a part of it. The only evidence we have on the subject at all is on page 33 of Transcript of Record, where this question and answer occur.

Mr Joseph S. Kaufman was asked the question, "Then after he had quit business you returned out of the money he had given you $767.00 to apply to the laboring people. That he did not have money enough to pay." Answer: "Yes, sir." There is no evidence that the money was so applied. There is no evidence that, if applied, it in any way inured to the benefit of the estate for it does not show that the claims came within the provision of the Act of Congress. There is no pretense of anything except that Joseph S. Kaufman paid to his brother, Gustave Kaufman, $767.00, and surely, with nothing more than that, it does not come within the provision of the act which says that it must have inured to the benefit of the estate.

The third question is the question of interest. We shall not take time to discuss it. If this Court is inquisitive upon the point at all, they will discover it was not raised in the Court below; it was not heard of until assigned in error in the Superior Court. At that time, the judgment was corrected by making the interest date from the time of the bringing of the suit rather than the time of the receipt of the money; because there would have to be a demand made before it would bear interest, and there was no evidence of demand prior to the bringing of the suit, but surely, there is no federal question involved in the determination of whether a given amount of money found by jury to be due to the estate of the bankrupt, should or should not, bear interest.

Respectfully submitted,

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